**CHEW CHEE MUN**

**v.**

**MBF FINANCE BHD**

HIGH COURT MALAYA, PENANG
RK NATHAN J
[CIVIL APPEAL NO: 12-32-2003]
21 MAY 2003

***PARTNERSHIP:*** *Suits by and against partnership - Liabilities of partners - Debt - Whether jointly liable - Debt partly settled by a partner - Whether creditor entitled to absolve partner from liability - Whether could sue other partner as sole proprietor for balance payment - Whether could obtain summary judgment against other partner - Partnership Act 1961, ss. 11, 19(2), (3) - Contracts Act 1950, s. 44*

The appellant and one Leong were partners in a partnership firm known as Multi-Tech Colour Photolab ('the partnership'). In 1998, the respondent sued the partnership for a sum of RM72,436.80 allegedly owed it by the latter. Leong paid the respondent RM36,300, and that being so the respondent discharged Leong from further liability and filed a fresh suit against the appellant for RM40,619.47. It was not in dispute that the appellant was then sued as a sole proprietor, as Leong had since withdrawn from the partnership. In so claiming against the appellant, however, the respondent never disclosed about the settlement with Leong, and the appellant was hence left in the dark as to the said settlement. Be that as it may, the learned Session court judge, having heard the argument, entered summary judgment for the respondent. The appellant appealed and the main issue that arose was whether, on the facts and in the circumstances herein, and bearing in mind the import of ss. 11 and 19 of the Partnership Act 1961 ('the Act'), summary judgment could properly be granted to the respondent.

**Held:**

**[1]** Section 11 of the Act states that every partner in a firm is jointly liable with the other partner for all debts of the firm. This apart s. 19(3) states that before a retiring partner is discharged of any existing liability there must be an agreement to that effect entered into between the retiring partner, the creditor and the remaining member or members of the

partnership which remaining member or members would enter into that agreement of discharge as a newly constituted firm. No such agreement was entered into in this case, as the appellant, to all intents and purposes had been kept in the dark with regard to the settlement between the respondent and Leong. (pp 26 c-d & 27 a)

**[2]** There is no merit in the argument that s. 44 of the Contracts Act 1950 gives the respondent the right to sue the appellant without joining Leong as a party. The Contracts Act which is a general legislation referring to the general conduct of a promisor cannot apply when there is a specific Act, namely the Partnership Act 1961 to deal with the issue at hand. (p 27 c-d)

**[2a]** In any case, s. 44 of the Contracts Act 1950 deals with a situation where there is an absence of an express agreement, whereas, in the present case, there was an express agreement between the promisee and one of the promisors without the knowledge of the other promisor. Further, s. 44 envisages that the promisor has to pay the entire sum, whereas the appellant herein was not asked to pay the whole entire sum of RM72,436.80. Thus, even considering s. 44 as it stands, there is no way the said section could assist the respondent. (p 27 e-g)

*[Appeal allowed; judgment set aside; case remitted for further hearing.]*

**Case(s) referred to:**
*Leong Sing v. Perusahaan Kuari (Melaka Pindah) Sdn Bhd [1997] 1 CLJ 307 HC* ***(dist)***

**Legislation referred to:**
Contracts Act 1950, s. 44(2)
Partnership Act 1961, ss. 11, 19(2), (3)
Subordinate Courts Rules 1980, O. 10 r. 3(2)

*For the appellant/defendant - Thayalan Muniandy; M/s Thayalan & Assoc*
*For the respondent/plaintiff - Vithyavathi Karthigesu; M/s TS Foo & Partners*

*Reported by WA Sharif*

## JUDGMENT

**RK Nathan J:**

The respondent, finance company entered into an equipment lease agreement (ELA) on 24 December 1996 with Chew Chee Mun (the appellant herein) and his partner Leong Kong Meng (Leong) both trading as Multi-Tech Colour Photolab. When the partners defaulted the respondent sued both the partners at the Session Court at Georgetown by way of Case No. 52-1640-98 (the first

*a* action). Under the ELA the total rental payable was RM89,280. However the partners were sued for RM72,436.80. Leong withdrew from the partnership on 30 August 1997.

*b* By a letter dated 26 February 2001 the company released Leong from any further liability since Leong had paid a total sum of RM36,300. The said letter is reproduced for its full effect.

Our Ref : 09-0701-002321-1
Date : 26/02/2001

*c* Mr. Leong Kong Meng
56-K, Choong Lye Hin Road (Without Prejudice)
Tanjung Tokong,
10470 Penang.

Dear Sir

*d* **Re: Lessee: Multi-Tech Colour Photolab Agreement No: 9-0701-002321-3**

The above matter refers

*e* This is to confirm that have we received RM15,000.00 on 31/10/2000 and RM21,300.00 on 30/11/2000 (Total RM36,300.00) from you and therefore you are fully discharged from all liabilities as a lessee and/or guarantor for the above mentioned account.

We thank you for your payments and co-operation.

*f* Yours Faithfully,
MBF FINANCE BERHAD

sgd
MOLLY ANG BEE HONG Head of Collection

/ann

*g* The respondent then withdrew the first action with liberty to file afresh and commenced the present action solely against the appellant for the sum of RM40,619.47 made up as follows:

*h*

*i*

**BUTIR-BUTIR**

| | | |
|---|---|---|
| Jumlah Sewa *(Total Rental)* | : | RM85,748.32 |
| **Tolak** | | |
| Ansuran yang telah dibayar *(Rental paid to date)* | : | RM66,720.00 |
| Harga jualan pada 22/3/2001 *(Disposal Value on 22/3/2001)* | : | RM 550.00 |
| | | RM18,478.32 |
| **Tambah** | | |
| Faedah pembayaran lewat @ 1.18% sebulan *(Interest on late payment @ 1.18% per month)* | : | RM15,090.10 |
| Bayaran Peguam *(Legal fee)* | : | RM 4,451.97 |
| Bayaran Penyimpanan Barang *(Storage fee)* | : | RM 2,565.67 |
| Bayaran Pos *(Postage fee)* | : | RM 33.41 |
| JUMLAH TUNTUTAN SETAKAT 22/1/2002 | : | RM40,619.47 |

The respondent made no mention in the present claim of the partnership or of the settlement by Leong or why only the appellant has been sued for the said sum. The learned Sessions Judge after hearing arguments granted summary judgment. Hence this appeal.

**Findings Of The Court**

In the present action the respondent is suing the present appellant as a sole-proprietor. Section 11 of the Partnership Act 1961 reads as follows:

> Liability of partners.
>
> 11. Every partner in a firm is liable jointly with the other partner for all debts and obligations of the firm incurred while he is a partner; and after his death his estate is also severally liable in a due course of administration for such debts and obligations, so far as they remain unsatisfied but subject to the prior payment of his separate debts.

However s. 19(2) & (3) of the same Act which deal with the liability of an outgoing partner read as follows:

> (2) A partner who retires from a firm does not thereby cease to be liable for partnership debts or obligations incurred before his retirement.
>
> (3) A retiring partner may be discharged from any existing liabilities by an agreement to that effect between himself and the members of the firm as newly constituted and the creditors, and this agreement maybe either express or inferred as a fact from the course of dealing between the creditors and the firm as newly constituted.

Sub-section (3) clearly states that before a retiring partner is discharged of any existing liability there must be an agreement to that effect entered into between the said retiring partner, the creditor and the remaining member or members of the partnership which remaining member or members would enter into that agreement of discharge as a newly constituted firm and as in this case, the appellant ought to have signed this agreement as a sole-proprietor. The rationale behind the requirement of the remaining member or members to sign as a newly constituted firm is to show to the creditor concerned that they will accept liability or responsibility for the remaining balance of the debt. This will also absolve the retiring partner, or his estate after his death from being burdened with liability notwithstanding the fact that the retiring partner had settled his debt.

There is another reason for a consensus at least between the partners. It is always possible that as between them like in this case one of them would want to accept a greater share of the responsibility of settling the debt; and this could be even with the tacit consent of the creditor. Hence the need for the creditor to be a party to the agreement.

However in this case, by it's letter dated 26 February 2001 the respondent had accepted a sum of RM36,300 as settlement of Leong's share as a guarantor of the debt and had arbitrarily discharged him from any further liability. At this stage it is important to revisit s. 19(3) of the Partnership Act. It emphasises that the existence of such an agreement could even be inferred as a fact from the course of dealing between the respondent and the appellant. It is obvious that the said letter dated 26 February 2001 was not even copied to the appellant. Further to this and having settled the matter with Leong, the respondent sent a fresh notice of demand dated 23 January 2002 to the appellant for RM40,619.47. Even in this letter the respondent made no mention of the settlement with Leong. Even in the statement of claim the respondent made no mention of this. To all intents and purposes the appellant has been kept in the

dark with regard to the settlement between the respondent and Leong. There is no way that this court can infer that the present defendant was aware of and had acquiesced in the agreement.

The respondent relied on s. 44 of the Contracts Act 1950 which reads as follows:

> Any one of joint promisors may be compelled to perform.
>
> (1) When two or more persons make joint promise, the promisee may, in the absence of express agreement to the contrary, compel any one or more of the joint promisors to perform the whole of the promise.

Firstly the Contracts Act is a general legislation referring to the general conduct of a promisor and a promisee. The Partnership Act 1961 is a specific piece of legislation enacted solely to deal with matters concerning the rights and liabilities of partners *inter se* and towards third parties. To my mind when there is a specific Act to deal with the issue at hand it is futile to rely on a general enactment. I therefore reject the argument of the respondent that s. 44 gives it the right to sue the present appellant without joining Leong as a party.

Secondly s. 44 deals with a situation where there is an absence of an express agreement. Here there is an express agreement between the promisee and one of the promisors without the knowledge of the other promisor. On this ground too judgment must be entered against the respondent.

Thirdly s. 44 envisages that the promisor in this case, namely the appellant has to pay the entire sum ie, "to perform the whole of the promise". But this is not the bargain. The appellant herein is not asked to pay the whole of the promise ie, the entire sum of RM72,436.80 as sued in the earlier action.

Considering s. 44 as it stands there is no way that the said section could assist the respondent. The respondent referred me to *Leong Sing (sued as a firm) v. Perusahaan Kuari (Melaka Pindah) Sdn Bhd (formerly known as Malacca Lian Hwa Sdn Bhd)* [1997] 1 CLJ 307 wherein the court held that under O. 10 r. 3(2) of the Subordinate Courts Rules 1980 where a partnership had been dissolved to the knowledge of the plaintiff, a choice was given to the plaintiff to choose the person whom he wished to be made liable. But as I said earlier this case will in no way assist the respondent. The specific provisions of s. 19(2) & (3) of the Partnership Act 1961 were not considered in this case.

The case of *Leong Sing* merely considered the situation where when a writ of summons had not been served on a partnership, whether service was proper within the meaning of O. 10 r. 3(2) of the Subordinate Court Rules 1980. The situation that I have to consider was never in issue.

Finally the respondent relied on s. 44(2) of the Contracts Act 1950 which reads as follows:

> Each promisor may compel contribution. (2) Each of two or more joint promisors may compel every other joint promisor to contribute equally with himself to the performance of the promise, unless a contrary intention appears from the contract.

As I had said earlier the Contracts Act 1950 is subject to the Partnership Act 1961 and it is my judgment that the provisions of the specific act such as the Partnership Act 1961 must prevail over the provisions of the general Contracts Act 1950.

In the circumstances I allowed the appeal with costs and set aside the judgment of the lower court and further ordered that the case be remitted for continued hearing before the same court.